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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Independent Expert on the promotion of a democratic and equitable international order*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the thematic report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, pursuant to Council resolution 30/29.

* The annexes to the present report are reproduced as received.

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I. Introduction

1. In its resolution 30/29, the Human Rights Council invited the Independent Expert on the promotion of a democratic and equitable international order to continue to develop studies on the adverse human rights impact of international investment agreements, bilateral investment treaties and multilateral free trade agreements on the international order.

2. The present report complements the analysis contained in the Independent Expert's 2015 report to the Council (A/HRC/30/44 and Corr.1) and his 2015 report to the General Assembly (A/70/285 and Corr.1), addresses the aggravation of the "regulatory chill" generated by investor-State dispute settlements,[1] and demonstrates that the newly proposed investment court system suffers from the same fundamental flaws as investor-State dispute settlement. Essentially, the investment court system lacks the fundamental safeguards to ensure an independent legal system in line with the requirements of due process. That analysis was shared by the associations of German and Spanish judges in opinions from 4 February 2016[2] and 23 May 2016,[3] respectively. Under the investment court system, States would remain vulnerable to the same kind of frivolous and vexatious claims that have characterized the hugely expensive, slow and unpredictable investor-State dispute settlement litigation. Important issues of constitutionality and the rule of law arise when non-State actors exercise "prerogative powers" beyond public control and judicial scrutiny.

3. The human rights impacts of the General Agreement on Tariffs and Trade and World Trade Organization (WTO) law and practice, in particular the dispute settlement mechanism, are also addressed, recognizing that WTO multilateralism is more transparent than practices under bilateral investment treaties and free trade agreements. The Independent Expert is confident that WTO, through civil society inputs at its public forums, will yet discover its vocation to use trade to promote human rights and development. However, fundamental problems raised by bilateral investment treaties and free trade agreements are reflected in WTO practices, notably concerning the agricultural and intellectual property sectors. Closer monitoring by national parliaments and by the Inter-Parliamentary Union (IPU) is necessary to recast trade in a human rights-friendly framework. The tenth WTO Ministerial Conference, held in Nairobi in December 2015, could have delivered good results had it been true to the commitments made under the Doha Development Agenda, but it was seriously marred by the intransigence of some States that attempted to bury the Agenda and prevented progress on food security and environmental protection.

4. The issues are so complex and the consequences so serious that the present report can be read only as a work in progress, since it will be necessary to continue monitoring the adverse impacts of old bilateral investment treaties and free trade agreements and to see whether initiatives to reform the system and eliminate *contra bonos mores* provisions in those treaties result in a more democratic and equitable economic regime, or whether egregious abuses continue with impunity. The role of parliaments is crucial in ensuring

[1] *World Investment Report 2015* (United Nations publication, Sales No. E.15.II.D.5); http://investmentpolicyhub.unctad.org/ISDS; "Investor-state dispute settlement: the arbitration game", *The Economist*, 11 October 2014; European Economic and Social Committee, "Opinion of the European Economic and Social Committee on Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries", Brussels, 27 May 2015.

[2] ttip2016.eu/files/content/docs/Full%20documents/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf.

[3] http://juecesparalademocracia.blogspot.ch/; http://ciarglobal.com/es/ipd-rechaza-arbitraje-ttip/.

human rights protection while promoting trade. The Parliamentary Conference of WTO in June 2016 demonstrated awareness of the problems. The world expects more than rhetoric.

II. Facts about investment protection

5. World trade is expanding continuously. According to figures from the World Bank, world trade reached US$ 19.11 trillion in merchandise exports in 2014.[4] According to WTO, the volume of trade in services in 2014 exceeded $4.87 trillion.[5] Tariffs are already low and do not constitute a significant hindrance to trade. There is no need to adopt more "free trade agreements", which are asymmetrical agreements providing privileges to investors but no enforceable obligations.

6. Over the past decades, the number of bilateral investment treaties and free trade agreements has grown beyond 3,200, following the hard sell and often over-optimistic projections made by trade representatives. The siren call of foreign direct investment (FDI) remains strong. Proponents claim that investment protection treaties are necessary to attract FDI. Lobby groups including the International Chamber of Commerce routinely declare that "strong investment protection standards should be a policy priority for all governments in order to promote new waves of prosperity-enhancing FDI".[6] Yet no compelling empirical evidence backs that up. Of course, some econometric studies contend that the treaties attract investment, but other studies find that they have no effect or a negative impact.[7] In 2015, the European Union Commissioner for Trade, Cecilia Malmström, stated that "the Commission is aware that most studies do not establish a direct and exclusive causal link between the treaties and investment."[8] Brazil gets the lion's share of FDI in Latin America, yet has not ratified any bilateral investment treaties. South Africa has cancelled a number of bilateral investment treaties (BITs) because, as a government official explained: "South Africa does not receive significant inflows of FDI from many partners with whom we have BITs, and at the same time, continues to receive investments from jurisdictions with which we have no BITs."[9]

7. Globally, 696 investor-State dispute settlement cases concerning 107 countries had been counted as at January 2016.[10] Owing to the opacity of the system and the non-publication of many settlements, the actual figure could be higher. A quarter of the registered cases end in settlement, frequently involving payments or changes in laws and regulations to accommodate investors. However, the ontology of business is risk-taking. Investors who think risk is too high should buy risk insurance or refrain from investing. The State must not guarantee profit to investors. Protection is available through domestic courts.

8. Some 72 per cent of known cases were filed against developing and transition economies. The number of cases against developed countries is growing as foreign

[4] http://data.worldbank.org/topic/trade.

[5] www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf, p. 11.

[6] International Chamber of Commerce Austria, "Bilateral investment treaties and investor-State dispute resolution", 2014.

[7] Lauge Poulsen, "The importance of BITs for foreign direct investment and political risk insurance", in *Yearbook on International Investment Law and Policy 2009-2010*, Karl P. Sauvant, ed. (New York: Oxford University Press, 2010); Jason Yackee, "Do bilateral investment treaties promote foreign direct investment? Some hints from alternative evidence", University of Wisconsin Legal Studies Research Paper No. 1114 (22 March 2010).

[8] www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-008187&language=EN.

[9] Xavier Carim, "International investment agreements and Africa's structural transformation: a perspective from South Africa", South Centre Investment Policy Brief No. 4, August 2015, p. 4.

[10] http://investmentpolicyhub.unctad.org/News/Hub/Home/504.

investors, arbitrators and new treaties bring investor-State dispute settlement into new domains. Such settlement leads to socializing losses and privatizing gains,[11] which is a recipe for social unrest.

9. The number of such cases is rising. From a total of 3 known cases in 1995, 70 new cases were registered during 2015. According to the United Nations Conference on Trade and Development (UNCTAD),[12] investors triumphed in 60 per cent of admissible cases. In principle, States never "win"; all they can hope for is to be "acquitted", and even then, they recover only a portion, if any, of their legal costs, which commonly reach millions of dollars. In *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, the lawyers billed $74 million and the tribunal's three arbitrators took home $7.4 million. The award amounted to $50 billion.[13]

10. The main financial beneficiaries of investor-State dispute settlement awards are not small investors or middle-sized enterprises, whose investment would be most needed for job creation and long-term development, but monopolies with at least $1 billion in annual revenue and individuals with a net worth of over $100 million.[14]

11. The regulatory chill caused by the mere existence of investor-State dispute settlements has effectively dissuaded many States from adopting much-needed health and environmental protection measures. Peter Kirby of the law firm Fasken Martineau wryly described investor-State dispute settlement as "a lobbying tool in the sense that you can go in and say, 'Okay, if you do this, we will be suing you for compensation'. It does change behaviour in certain cases."[15] The law firm Steptoe and Johnson has referred to investor protections as "a basis for preventing wrongful state conduct … As such, they may be a highly important tool for foreign investors and industry associations in advocating against legislative changes."[16] Although some treaties pro forma acknowledge State sovereignty, the reality is different. Professor David Boyd has noted that "while there is language in trade deals that purports to protect governments' right to regulate, many arbitration panels have ignored or narrowly interpreted these provisions, making them practically useless."[17] Professor David Schneiderman frankly described the system as "an emerging form of supraconstitution … designed to insulate economic policy from majoritarian politics."[18]

12. Several mega-regional treaties involving close to 90 States are currently under negotiation, mostly in secret. They include the Trans-Pacific Partnership Agreement,[19] the Transatlantic Trade and Investment Partnership, the Comprehensive Economic and Trade Agreement, negotiated between the European Union and Canada, and the Trade in Services Agreement. If they enter into force with their investment chapters, the arbitration bonanza will massively expand. As Nobel laureate Joseph Stiglitz aptly put it, "corporations are attempting to achieve by stealth — through secretly negotiated trade agreements — what

[11] Transnational Institute, "Socialising losses, privatizing gains" (Amsterdam, 2015).

[12] *World Investment Report 2015*, p. 116.

[13] www.iisd.org/itn/wp-content/uploads/2014/09/iisd_itn_yukos_sept_2014_1.pdf; http://globalarbitrationreview.com/news/article/35248/us50-billion-yukos-awards-set-aside-hague.

[14] Pia Eberhardt, "The zombie ISDS: rebranded as ICS, rights for corporations to sue states refuse to die" (Brussels, Corporate Europe Observatory, 2016), p. 14.

[15] Pia Eberhardt, "The zombie ISDS", p. 13.

[16] www.steptoe.com/publications-9867.html.

[17] www.thestar.com/opinion/commentary/2016/01/11/dont-let-trade-deals-hamper-climate-progress.html.

[18] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, (New York, Cambridge University Press, 2008), p. 3.

[19] www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17006.

they could not attain in an open political process",[20] and "if there ever was a one-sided dispute resolution mechanism that violates basic principles, this is it."[21]

III. From the responsibility to protect to the responsibility to act

13. The notion of the responsibility to protect[22] was formulated at the 2005 World Summit. Theoretically it has the potential, depending how it is interpreted and applied, to reaffirm the duty of each State to protect the population under its jurisdiction from internal and external dangers by the adoption of preventive and curative policies to counteract structural violence caused by State and non-State actors. On the other hand, a narrow interpretation of the responsibility to protect as a pretext to allow foreign intervention in the internal affairs of States poses dangers signalled at the General Assembly debate in July 2009, which revealed the potential geopolitical misuse of the responsibility to protect as a means to circumvent the *jus cogens* prohibition of the use of force stipulated in Article 2 (4) of the Charter of the United Nations. While the responsibility to protect could advance human rights, its slogan-like mediatization and the dangers of arbitrary and selective application would erode the Charter.[23]

14. The Independent Expert proposes a reformulation of the doctrine to lift it out of the narrow focus on protecting populations from war crimes and genocide to a broader duty to protect populations from war, military interventions and structural violence. The international community has an interest in reaffirming a duty to protect and actively advance civil, cultural, economic, political and social rights. Governments, parliaments and courts have a responsibility to act in the public interest for economic stability, social development, environmental sustainability, food security, improvement of health and labour standards, through taxation, precautionary and preventive measures against the dangers of genetically modified organisms,[24] fracking,[25] open-pit mining, pesticides, air and water pollution, corruption, monopolies and asymmetrical trade. Those generic obligations of governance are the raison d'être of organized society. Rights holders of the responsibility to act are individuals and peoples, including indigenous peoples. Duty bearers are Governments, parliaments and courts.

15. Never must the courts become instruments of injustice. Never should they lend themselves to the execution of manifestly unjust investor-State dispute settlement awards. Courts should exercise their constitutional and implied powers to deny implementation in cases of abuse of rights, unjust enrichment or manifestly ill-founded awards, such as when arbitrators invent outrageously extensive interpretations.

16. The human rights and fundamental freedoms enshrined in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, numerous regional human rights treaties like the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the European Social Charter, the American Convention on Human Rights and the

[20] Joseph Stiglitz, "Developing countries are right to resist restrictive trade agreements", *The Guardian*, 8 November 2013.

[21] Joseph Stiglitz, "The secret corporate takeover of trade agreements", *The Guardian*, 13 May 2015.

[22] www.un.org/en/preventgenocide/adviser/responsibility.shtml; A/63/677.

[23] www.un.org/press/en/2009/ga10850.doc.htm.

[24] www.globalresearch.ca/the-seeds-of-suicide-how-monsanto-destroys-farming/5329947.

[25] www.alternet.org/environment/8-dangerous-side-effects-fracking-industry-doesnt-want-you-hear-about.

African Charter on Human and Peoples' Rights, are binding treaty obligations, not mere pledges.

17. It appears that investors and transnational corporations understand human rights narrowly as the right to trade, the right to property and the right to profits. That perspective is supported by invoking the "laws of the market",[26] a kind of ideological fundamentalism or groupthink reflected in a speech by the former WTO Director Pascal Lamy, who argued at a United Nations Institute for Training and Research conference on 26 September 2010 that "trade ensures concrete realization of human rights".[27] The "right to competition" is also a favourite neo-liberal "right". But trade, property and competition are not ends in themselves and must be seen in the context of other rights and subject to reasonable regulation. Competition presupposes a level playing field, which often necessitates affirmative action to correct imbalances. Competition without solidarity is predator behaviour, especially when competition is rigged in favour of mega-corporations and monopolies.[28]

IV. Primacy of the international human rights treaty regime

18. All potential States parties to the Trans-Pacific Partnership Agreement, the Transatlantic Trade and Investment Partnership, the Comprehensive Economic and Trade Agreement and the Trade in Services Agreement are bound by the international human rights treaty regime and most are parties to universal and regional human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights and the European Social Charter. *Pacta sunt servanda* requires States to fulfil their human rights treaty obligations in good faith and prohibits them from entering into agreements that would delay, circumvent, undermine or make impossible the fulfilment of their human rights treaty obligations. However, discussing the human rights impacts of trade with government officials, trade representatives and corporate lobbyists, the Independent Expert realized that they did not immediately perceive the human rights dimensions. Hence the following summary of human rights treaty provisions that have been or can be adversely affected.

A. International Covenant on Civil and Political Rights

19. Article 1 provides that all peoples have the right of self-determination, to freely determine their political status and freely pursue their economic, social and cultural development. They have the right to freely dispose of their natural wealth and resources and may not be deprived of their means of subsistence. States parties have an obligation to promote the realization of the right of self-determination and cannot thwart it by entering into commercial agreements that effectively deprive peoples of their natural resources or

[26] Words conceal more than they elucidate. "The market" is not a law of natural science, but a bundle of power relations. When a dogmatist invokes as a magic phrase "the laws of the market", he means what the mega-corporations want. "Investment" may or may not be beneficial. While the funding of long-term investment in socially useful activities must be promoted, the management of existing assets to milk them for rents, dividends and capital gains hurts society. Wealth extraction is different from wealth creation. Market fundamentalism and free-trade-populism constitute a utopian, millenarian faith in the "invisible hand" of the market, and in a non-existent "trickle down" effect.

[27] www.wto.org/english/news_e/sppl_e/sppl172_e.htm.

[28] Ha-Joon Chang, "Kicking away the ladder", Foreign Policy In Focus (Silver City, NM: Interhemispheric Resource Center, December 2003).

entail land-grabbing or population displacement. Pursuant to the United Nations Declaration on the Rights of Indigenous Peoples, any use of indigenous lands requires their free, prior and informed consent. The Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO) stipulates bottom-up consultation and participation.[20]

20. Article 2 provides that all individuals have a right to an effective remedy, such as to compensation for environmental damage caused by transnational corporations. But even a decision of the highest State court against a transnational corporation can be left without implementation when the corporation invokes investor-State dispute settlement against the State and refuses to pay compensation to the victims (see, for example, *Chevron Corporation and Texaco Petroleum Corporation v. the Republic of Ecuador*, as discussed in the Independent Expert's other reports). Another problem is that individual victims have no standing before investor-State dispute settlement or investment court system tribunals.

21. Article 6 concerns the right to life. Many activities of transnational corporations threaten the right to life and the right to health,[21] such as when large areas are polluted through open-pit mining, oil sludge, toxic waste and radioactivity. The State has an obligation to adopt precautionary measures to avert such dangers, and that cannot result in corporate claims for "lost profits". Transnational corporations have been guilty of handing over the names of unionists to the police and to paramilitary groups, leading to the disappearance and death of human rights defenders.[22] In order to accommodate the interests of transnational corporations, national police and sometimes armies have been used against demonstrators, at times resulting in deaths. The so-called "evergreening" of patents in the pharmaceutical industry may also lead to deaths because of lack of access to generic medicines and medical equipment at affordable prices.

22. Article 12 concerns the right to freedom of movement. Some mega-projects have led to the involuntary transfer of populations and the loss of homelands, churches and cemeteries.[23] The oil, gas and mining industries have left landscapes devastated and destroyed ecosystems, causing populations to move. In cases where the environment has been seriously polluted, populations cannot return to their homes.

23. Article 14 concerns the right to due process. All suits at law must be adjudicated by independent tribunals under the principles of transparency and accountability. Investor-State dispute settlement tribunals have repeatedly been shown to lack independence, transparency, predictability and accountability. That retrogression undermines the rule of law based on public courts. Some arbitral awards violate the principle of separation of powers, such as when the arbitrators in the Chevron case ordered the Government of Ecuador to interfere with the independent Ecuadorian judiciary by overruling the judgment of the Ecuadorian courts.

24. Article 19 concerns the right to have access to information, including on free trade and investment agreements. Multiple stakeholders, including consumer groups, environmental protection experts, labour unions and health professionals, need precise

[20] A/70/301.

[21] WHO Director-General, Margaret Chen, at the opening of the sixty-ninth session of the World Health Assembly in May 2016, warned about "man-made disasters created by policies that place economic interests above concerns about the well-being of human lives and the planet that sustains them", www.who.int/dg/speeches/2016/wha-69/en/.

[22] Horacio Verbitsky and Juan Pablo Bohoslavsky, *Cuentas Pendientes* (Buenos Aires, Siglo XXI Editores, 2013); www.theguardian.com/world/2016/jun/21/berta-caceres-name-honduran-military-hitlist-former-soldier.

[23] A/HRC/32/40.

information to evaluate the impact of trade agreements on society. They should not have to rely on whistle-blowers. Secrecy has a corrosive effect on democracy and the rule of law.

25. Article 21 concerns the right of peaceful assembly. Demonstrators against mega-projects have been harassed, detained and some of them killed.[33]

26. Article 24 concerns children's rights. Compensation paid to transnational corporations pursuant to investor-State dispute settlement awards reduces public funds to advance the rights of the child, reduce infant mortality and provide better education.

27. Article 25 concerns the right to participate in the conduct of public affairs, which has been systematically violated when elaborating and negotiating bilateral investment treaties and free trade agreements in secret, and when adopting them without parliamentary oversight. In view of the dangers posed by investor-State dispute settlement and the investment court system to the rule of law and human rights, such agreements must be subject to referendums. Parliaments must not fast-track ratification of treaties that have been negotiated without multi-stakeholder participation or have met massive public opposition when provisions of the treaties have become public. More than 3.3 million Europeans signed a petition against the Transatlantic Trade and Investment Partnership and a public consultation by the European Commission resulted in rejection by 97 per cent of respondents.[34]

28. Article 26 concerns equality before the law. The right to equality before the law and the prohibition of discrimination are violated when special rights are granted to foreign investors, excluding domestic investors and corporations.

29. Article 27 concerns minority rights. While indigenous peoples are protected under article 1 of the Covenant, minorities also demand protection of their culture and livelihood, which are frequently violated by transnationals through destruction of their environment, hunting, fishing and their access to clean water.

B. International Covenant on Economic, Social and Cultural Rights

30. Investor-State dispute settlement and the investment court system adversely affect the enjoyment of most provisions of the Covenant, as elucidated in the Committee's general comments.

31. Article 6 concerns the right to work. Mega-agreements like the North American Free Trade Agreement have led to the loss of millions of jobs and a race to the bottom in labour rights, such as when manufacturing jobs were relocated from the United States of America to Mexican maquiladoras, notorious for subhuman working conditions and unconscionably low wages.

32. Article 7 concerns the right to just and favourable conditions of work. In its general comment No. 23 (2016) on that right, the Committee on Economic, Social and Cultural Rights stressed that it must be protected in trade agreements.

33. Article 8 concerns the right to form trade unions and to strike. Trade unionists have been targets of transnational corporations, dismissed from their jobs, and sometimes victims of violence perpetrated by private security companies and paramilitary groups.

[33] A/HRC/29/25.

[34] Pia Eberhardt, "The zombie ISDS", p. 5. Yet the European Commission failed to see the elephant in the room; why include investor-State arbitration at all?

34. Article 9 concerns the right to social security. The relocation of jobs to countries that have poor or no social security legislation counters the commitment to progressively achieve that right. The Committee's general comment No. 19 (2007) on the right to social security states that agreements concerning trade liberalization should not restrict a State party's capacity to ensure the full realization of the right to social security.

35. Article 10 concerns the protection of the family and requires States parties to accord the family, as the natural and fundamental group unit of society, the widest possible protection and assistance. Moreover States parties should provide mothers with paid leave before and after childbirth, and protect children from economic and social exploitation.

36. Article 11 concerns the right to an adequate standard of living, including adequate food, clothing and housing. In developing countries, food security is of crucial importance. Threats of investor-State dispute settlement litigation from developed countries' subsidized agro-industry have prevented developing countries from adopting agricultural policies to ensure food security.[15] Investor-State dispute settlement awards and potential investment court system judgments deprive Governments of funds essential to meet their health, housing and education obligations.

37. Article 12 concerns the right to the highest attainable standard of physical and mental health. The so-called "evergreening" of patents by the pharmaceutical industry reduces access to generic medicines.[16] The deliberate withholding of life-saving medicines entails a violation of the right to life.

38. Article 13 concerns the right to education. Privatizing education aggravates the already unbalanced playing field, making it more difficult for poor families to help their children overcome poverty.

39. Article 15 concerns the right to one's own culture. That includes one's own language and its use in film, television and music. A population will lose its identity when flooded by cheap foreign films and television. Governments have an obligation to preserve their populations' cultures as world heritage in accordance with the aim of the United Nations Educational, Scientific and Cultural Organization to promote diversity and oppose cultural imperialism.

40. Article 25 is crucial for indigenous and non-self-governing peoples, in addition to article 1 on self-determination. Article 25 reaffirms that nothing in the Covenant should be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. The logging, oil, gas and mining industries loot indigenous resources.

41. The regional human rights protection systems, the Convention for the Protection of Human Rights and Fundamental Freedoms (arts. 5, 6, 8 to 11, 13 and 14), the European Social Charter, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights establish binding obligations that require proactive measures of implementation and affirmative action to counteract engrained inequalities and the sequels of colonialism and discrimination.

42. Although the human rights dimension of trade is obvious, investors and corporations think that they can continue working in a human-rights-free zone. Facts fall into the category of "facts without consequences" because the neo-liberal bulldozer rolls on, ignoring the interests of billions of human beings who are subjected to exploitation and habitat-devastation.

[15] Guiding principles on human rights impact assessments of trade and investment agreements.
[16] A/69/299.

V. Investor-State dispute settlement, the investment court system and State sovereignty

43. Further research into the relationship between trade and human rights has led the Independent Expert to reverse his conditional endorsement of an international investment court (see A/HRC/30/44 and Corr.1, paras. 62 (i) and 66 (a); and A/70/285 and Corr.1, para. 55 (a)). Having re-evaluated the dangers, he considers the investment court system to be essentially a rebranding exercise.

44. In September 2015, European Union Commissioner for Trade, Cecilia Malmström, proposed replacing investor-State dispute settlement with an investor court system. Despite some improvements, including the introduction of an appeal mechanism and the appointment of judges, the investment court system fails to address the fundamental investor-State dispute settlement problems and aggravates the situation by multiplying the number of potential claims by a factor of 10,[17] thus increasing the regulatory chill. The investment court system must be rejected for the following reasons:

(a) The system is a one-way jurisdiction where investors can sue States, but not vice-versa. It is based on the arbitration model and is a pseudo-court lacking the fundamental safeguards to ensure an independent legal system, as found by the associations of German and Spanish judges;

(b) The system does not impose obligations on investors, such as the "do no harm" principle, or compliance with environmental, social, labour, health or safety standards;

(c) Foreign investors, unlike domestic investors and corporations, are privileged and allowed to circumvent domestic courts. There is no requirement to exhaust domestic remedies;

(d) Expansive interpretations of the terms "investment", "indirect expropriation", "fair and equitable treatment" and "legitimate expectations" allow investors to sue States, even when the impugned legislation is in the public interest;

(e) The burden of proof has been reversed, so that a State has to prove that its social legislation is "legitimate" and not "excessive", thus inviting investors to litigate against precautionary measures and health and environmental legislation;

(f) The chilling effect or regulatory freeze is intensified, so that States may not dare adopt social legislation for fear of being sued for millions of dollars;

(g) The system does not grant standing to victims of investor action.

45. Under the proposed investment court system, the following pending investor-State dispute settlement cases could be filed, generating similar legal costs and billion dollar awards:

(a) *Philip Morris Brands Sàrl and others v. Uruguay*, which was filed in 2010 and is still pending, in which the tobacco giant is suing Uruguay for implementing its obligations under the World Health Organization Framework Convention on Tobacco Control;

[17] Natacha Cingotti and others, "Investment court system put to the test" (Canadian Centre for Policy Alternatives, Corporate Europe Observatory, Friends of the Earth Europe, Forum Umwelt und Entwicklung and the Transnational Institute, Amsterdam/Brussels/Berlin/Ottawa, 2016); Maude Barlow and Raoul Marc Jennar, "Le fléau de l'arbitrage international", *Le Monde diplomatique*, February 2016.

(b) *Lone Pine Resources Inc. v. Canada*, concerning a precautionary fracking moratorium enacted in Quebec;

(c) *Vattenfall AB and others v. Germany* (2009), concerning the imposition in Hamburg of environmental standards for water use at a coal-fired power plant;

(d) *Vattenfall AB and others v. Germany* (2012), concerning the decision of Germany to phase out nuclear energy;

(e) *TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America*, in connection with President Obama's decision to oppose building the controversial Keystone XL pipeline as part of the commitment of the United States to tackle climate change;

(f) *Cosigo Resources, Ltd and others v. Colombia*, concerning denial of a permit to mine in the Amazonian rainforest. Colombia is being sued for $16.5 billion in "lost profits."

46. Moreover, the same type of cases already decided by investor-State dispute settlement arbitrators in favour of corporations could be filed under the proposed investment court system, including:

(a) *William Ralph Clayton and others v. Canada*, concerning an environmental impact assessment that prevented the construction of a large quarry and marine terminal in an ecologically sensitive locality;

(b) *Metalclad Corporation v. Mexico*, concerning the denial of a permit for a toxic waste deposit.

47. Those cases raise both human rights and constitutional questions. Can a State constitutionally allow such interference with its policy space? Can a State repudiate its duty to take precautionary measures, demand human rights, health and environmental impact assessments,[18] regulate taxation or raise the minimum wage? The State has a constitutional obligation to protect the population not only from an invading enemy army but also from private actors, including monopolies, cartels and corporate predators. The State has the obligation to prohibit certain business activities in order to protect the lives and welfare of the population. No State can turn its back on independent, transparent and accountable public courts.

48. Another question concerns the legal effect of the consent purportedly given. Have States that ratify bilateral investment treaties and free trade agreements effectively given consent to the run-away jurisdiction of investor-State dispute settlement or the investment court system? Is consent perfected or only inchoate? There is a peremptory norm of customary international law that jurisdiction is based on consent. That norm is based on the practice of sovereign States.

49. To illustrate that point, it is instructive to recall that the jurisdiction of the International Court of Justice is not universal or automatic, but conditioned on a declaration given by the State pursuant to Article 36 of the Statute of the International Court of Justice. That declaration of consent can also be withdrawn. Two or more States can consent to the jurisdiction of the International Court of Justice by ad hoc *compromis*. Yet another possibility of establishing jurisdiction is through treaty clauses, by virtue of which a State undertakes to accept the jurisdiction of the Court. Over 300 treaties contain such clauses.

[18] Guiding principles on human rights impact assessments of trade and investment agreements; James Harrison and Alessa Goller, "Trade and human rights: what does 'impact assessment' have to offer?", *Human Rights Law Review*, vol. 8, No. 4 (2008), pp. 587-615.

such as article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. Other treaties have optional protocols that provide for automatic referral, such as the Optional Protocols to the Vienna Convention on Diplomatic Relations. As with article 36 of the Statute of the International Court of Justice, such consent can be withdrawn.

50. Without the consent of the relevant State or States, tribunals lack jurisdiction. Investor-State dispute settlement and the investment court system, their "umbrella" and "survival clauses", violate the norm of jurisdiction by consent. As States can refuse the jurisdiction of the International Court of Justice, a fortiori they can decline the jurisdiction of ad hoc arbitral tribunals of three private arbitrators, especially when they encroach on the fundamental functions of the State.

51. Article 62 of the Vienna Convention on the Law of Treaties states that when the situation has significantly changed from the time when an agreement was signed (*rebus sic stantibus*), the agreement can be revised or terminated. Other provisions of that Convention allow revision or termination in cases of error (art. 48), fraud (art. 49), corruption (art. 50) or coercion (arts. 51-52).

52. As is clear from diplomats' statements and academic research, when most States, particularly developing States, entered into bilateral investment treaties and free trade agreements, hardly anyone imagined that investor-State dispute settlement arbitrators would challenge the ontological functions of the State in the fields of taxation, health, labour and environmental standards, overriding national law and the judgments of domestic tribunals. Such a surrender of sovereignty would have required absolute clarity in the texts of the treaties and agreements, not vague terminology subject to capricious interpretation. The presumption in customary international law is that a State cannot surrender sovereignty by chance or inadvertence, because international *ordre public* cannot accept that a State waive its responsibility to act functions. If a State does, the agreement can be considered as *contra bonos mores*.

53. In conversations with lobbyists and trade representatives, the Independent Expert was confronted with the question of why States signed bilateral investment treaties and free trade agreements in the first place. Perhaps the best answer was given by the Danish political scientist Lauge Poulsen, who conducted worldwide research and asked many government officials that question. He notes that "both qualitative and econometric evidence strongly indicates that a bounded rationality framework is best suited to explain the popularity of BITs in the developing world ... By overestimating the benefits of BITs and ignoring the risks, developing country governments often saw the treaties as merely 'tokens of goodwill'".[39] Poulsen shows that developing countries expected that the treaties would bring more foreign investment,[40] although that belief was never backed by empirical evidence and remained mostly unfulfilled, relying to the detriment of their populations on the positive "publicity" for those treaties and on UNCTAD advice. He observes that Governments were largely unaware of the political and economic risks, treaty negotiations lasted only a few hours, and sometimes not even lawyers or the experts from the justice ministries were involved. Poulsen concludes that "the majority of developing countries ... signed up to one of the most potent international legal regimes underwriting economic globalization without even realizing it at the time".[41] That assessment raises issues of good faith on the part of those selling the treaties, manifests unconscionable lack of due

[39] www.cbs.dk/files/cbs.dk/abstract.pdf.

[40] Lauge Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge, Cambridge University Press, 2015); www.oecd.org/trade/benefitlib/.

[41] Lauge Poulsen, *Bounded Rationality and Economic Diplomacy*, p. xvi.

diligence, and might lead to the suspicion of bribery and corruption. Treaty-making cannot be a game of trying to trick the other party into a toxic deal and then holding it hostage through "survival clauses". In sum, an investment protection mechanism cannot result in the transfer of important components of sovereignty from the State to private parties. Contracts that are unconscionable in their aims or in their consequences[42] are invalid and must be declared null and void under article 53 of the Vienna Convention on the Law of Treaties.

54. Considering that jurisdiction is based on consent, it would be instructive to consult the *travaux préparatoires* of bilateral investment treaties and free trade agreements and see whether investors and transnational corporations exercised due diligence and full disclosure and whether States understood the stakes and expressed valid consent. Treaties are made with rational expectations on both sides. No State will consent to a treaty when negative consequences are likely to outweigh potential benefits. If those dangers and negative consequences are not spelled out, consent cannot be presumed.

VI. World Trade Organization rules and practice

55. The Independent Expert wishes to thank the staff of the Secretariat of WTO for devoting much time to addressing his questionnaire (see annexes III and IV) and explaining in bilateral meetings many aspects of their important work.

56. He also thanks the former Special Rapporteur on the right to food, Olivier de Schutter, for sharing his insights in relation to the impacts of WTO rules and practice on the right to food and on human rights more generally.

57. The Independent Expert recognizes manifold human rights problems arising from commercial activity, but places trust in the existence of multilateral organizations like WTO. They have the opportunity and mechanisms to make trade work for human rights and development, as exemplified, for instance, by the adoption of the Doha Declaration, which is at the origin of an extended transition period for least developed countries exempting them from the obligation to enforce patents for pharmaceutical products.[43] The good will of States parties and a change of mindset toward more international solidarity offers a starting point.

58. Since the third Ministerial Conference, held in Seattle in 1999, and the civil society outcry against the adverse human rights impacts of commerce, WTO has become increasingly aware of the human rights dimensions of trade. In the wake of the global food crisis in 2008, the United Nations Secretary-General established the High-level Task Force on the Global Food Security Crisis, involving more than 20 international organizations, including WTO and the Office of the United Nations High Commissioner for Human Rights (OHCHR), towards a coordinated response to the crisis. A trilateral initiative with the World Health Organization (WHO) and the World Intellectual Property Organization (WIPO) also allows for policy dialogue and experience sharing. Since 2001, WTO has conducted a yearly Public Forum,[44] in which as many as 1,500 representatives from civil

[42] The contract between Shylock and the Merchant of Venice, Antonio, was *contra bonos mores*, because failure to reimburse a debt cannot have death as its consequence. By analogy, when a State cannot repay an investor, the consequence cannot be interventionism as practised in the nineteenth and twentieth centuries, when overt imperialism ruled, or more recently by IMF and central banks when imposing "austerity measures" and "privatizations". A/65/260 and A/69/273.

[43] Annex IV.

[44] Formerly known as "public symposium".
www.wto.org/english/forums_e/public_forum_e/public_forum_e.htm

society, academia, business, media, Governments, parliamentarians and inter-governmental organizations share their knowledge and make recommendations on how to tap the potential for multilateral cooperation and growth and how best to implement the commitments of the Doha Development Agenda.

59. While the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) may allow some policy space to member States, allowing them to exclude from patentability those inventions that, if commercially exploited, might adversely impact human, animal, plant life or the environment, and could potentially be invoked to exclude genetically modified crops,[45] the State's policy space is far from being ensured, and the regulatory chill may still prevent States from adopting precautionary measures. The priority of human rights, health and environmental protection must be spelled out.

60. WTO held its tenth Ministerial Conference from 15 to 19 December 2015 in Nairobi. In a joint press release issued before it, the Special Rapporteurs on the right to food and on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health joined the Independent Expert in urging Governments to deliver on the Doha Development Agenda (DDA) and not to betray commitments to address the needs of developing economies. "If trade is to work for human rights and development, it should contribute to the realization of the rights to adequate food, to the highest attainable standard of physical and mental health, and to live in a clean environment." There is no justification for defaulting on the Agenda: "Human rights obligations must be reaffirmed in the context of global trade rules to ensure that WTO negotiations and rules support development efforts to eliminate the root causes of hunger, ill-health and poverty, strengthen human rights protection and promotion and ultimately ensure that the newly adopted Sustainable Development Goals are achieved."[46]

61. A majority of States meeting in Nairobi favoured reaffirmation of the Doha framework, yet the opposition of some developed countries blocked consensus. Pressure on developing countries aimed at the introduction of new issues that would undermine the promotion of the right to development were reported. In response to the questionnaire sent by the Independent Expert, Saudi Arabia indicated that: "The WTO top priority should be concluding the DDA issues. The majority of WTO members are developing countries. A successful conclusion of the Doha Round would address developing country needs and contribute significantly to their economic growth and their integration into the global economy. Furthermore, concluding the Doha Development Round would address the trade distortions and imbalances in the WTO various agreements, and preserve the Special [and] Differential Treatment flexibilities granted to the developing countries ... The preamble of [the] Marrakesh agreement[47] establishing the WTO explicitly sets the objective to 'raise standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand'."

62. While promoting trade, WTO should place people before profits, and development before the expansion of monopolies. As the Director at the Washington Centre for Economic and Policy Research, Deborah James, observed in 2015: "Despite the global consensus, the rules in the WTO remain unchanged from decades past. WTO rules do not allow developing countries that were not subsidizing in 1994 to subsidize beyond the *de minimis* ... amount allowed to all WTO members. Meanwhile, the United States and Europe are allowed tens of billions a year in overtly trade-distorting subsidies for exported

[45] Annex IV.

[46] www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16870&LangID=E.

[47] www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

products, and have yet to implement the abolition of those subsidies to which they agreed nearly 10 years ago."

63. Implementation of those commitments would be facilitated if WTO were incorporated into the United Nations system and subordinated to the purposes and principles of the United Nations. Incorporation pursuant to articles 57 and 63 of the Charter would ensure that WTO not only actively contributes to the work of the Economic and Social Council, as it can proudly claim, but also gives proper weight to human rights as part of its own constitutional law.

64. The Nairobi Ministerial Conference reached some agreements on agricultural export subsidies, food aid and other issues. However, the Information Technology Agreement, covering products like Global Positioning System navigation systems and medical products such as magnetic resonance imaging machines, was primarily drafted by high income countries. None of the countries from the Group of Least Developed Countries was represented and only one of the lower-middle-income countries was represented.

65. It would have been desirable and in keeping with commitments to reduce poverty to adopt a clear statement on the legitimacy of public stockholding for food security that would allow countries to hold food stocks and enable them to deal with food shortages and fluctuations in global market prices.

66. While some developing countries were successful in securing concessions on cotton, an important issue for West African States, the rich countries won the deal on agricultural export subsidies, which did not abolish general subsidy schemes like the European Union Common Agricultural Policy. Observers noted that "the uneven WTO playing field, whereby rich countries' subsidy schemes are categorized as being 'allowable' while poorer countries are prevented from subsidizing their farmers, will continue".[35]

67. Barely three months after agreement on the Sustainable Development Goals, the Nairobi Ministerial Conference failed to implement target 17.10, pursuant to which States would "promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda". That paradox highlights the need to rethink the global trading system and the skewed ideological approach taken by some negotiators. One problem with WTO, beyond Doha and Nairobi, is the prevalent vision that equates "progress" with the growth of trade volumes and exports or with a higher gross domestic product. The Charter of the United Nations advocates another vision of progress as development, solidarity and human rights in a progressively more democratic and equitable international order.

68. Notwithstanding press comments in the United States and the European Union declaring the Doha Development Agenda "dead", paragraphs 30, 31 and 34 of the Nairobi Declaration give reason for hope.[36] While acknowledging the stalemate, they indicate that the Doha Work Programme is a single undertaking, meaning that Western countries cannot cherry-pick which parts to prioritize. It appears relevant for the developing countries to continue the struggle on the negotiating agenda of the single undertaking of that Programme. Under no conditions can any conditional plurilateral agreements, as envisaged by the United States and the European Union, be incorporated into the WTO treaty

[35] www.globaljustice.org.uk/blog/2015/dec/23/what-really-happened-wto-summit.

[36] www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm.

framework, except when there is a consensus on them at a ministerial conference.[50] Yet, at the Bali Ministerial Conference, held in 2013, the developing countries surrendered their most powerful leverage when they conceded the Trade Facilitation Agreement as a separate accord. Bearing in mind that that Agreement has not entered into force, one may suggest the developing countries withhold deposit of their instruments of ratification until they secure their own ...mands, including Nairobi decisions on "deliverables", in a single protocol incorporating the results of the Doha Work Programme.

69. The outcome document of the eleventh session of the Parliamentary Conference on WTO, held on 13 and 14 June 2016, states: "We appreciate the decision on public stockholding for food security purposes and call for the conclusion of negotiations on finding a permanent solution to the issue ... We believe that the issue of food security is vital for developing countries and that WTO rules must support efforts to combat hunger. In line with the same decision, we also want to stress the importance of a speedy adoption of a proposal for a special safeguard mechanism ... Flexibility, openness, inclusiveness and political engagement will be key to advancing on all the remaining issues of the Doha Development Agenda."

VII. World Trade Organization dispute settlement

70. On 24 February 2016, a WTO dispute panel adopted a decision against the efforts of India to create renewable energy through the extended use of solar panels.[51] One would think that, after the Conference of the Parties to the United Nations Framework Convention on Climate Change, everyone would support such initiatives, but WTO dispute panels seem to be caught in their own mantras and incapable of showing flexibility in accommodating the new priorities imposed by climate change. Despite some interesting initiatives in that field, such as the WTO Committee on Trade and Environment, there is still unwillingness to interpret broadly the general exceptions provided under the General Agreement on Tariffs and Trade 1994.[52]

71. The National Solar Mission of India, which aims at increasing the country's renewable energy in line with Sustainable Development Goal 7 on ensuring access to affordable, reliable, sustainable and modern energy for all, is a reasonable plan. It would create local jobs and bring clean energy to millions by generating 100 gigawatts of solar power annually, consistent with the goals of the Framework Convention on Climate Change. The WTO case was brought by the United States, which challenged the domestic content clause of India, which would require part of the solar cells to be produced nationally. India unsuccessfully tried to reach a settlement with the United States and now may have to adjust its solar programme to avoid WTO sanctions. The panel concluded that the measures of India were inconsistent with article 2.1 of the Agreement on Trade-Related Investment Measures and article III:4 of the General Agreement on Tariffs and Trade 1994, and were not covered by the derogation in article III:8 (a) of that General Agreement, or justified under the general exceptions in articles XX (j) and XX (d) of that General Agreement. The panel concluded that benefits accruing to the United States had been

[50] http://thewire.in/17950/news-of-dohas-death-may-be-premature-but-india-china-must-fight-to-save-the-day/; Chakravarthi Raghavan, *The Third World in the Third Millennium CE* (Penang, Third World Network, 2014).

[51] www.wto.org/english/news_e/news13_e/ds456rfc_06feb13_e.htm; www.ictsd.org/bridges-news/biores/news/us-launches-new-wto-challenge-against-india-solar-incentives; and www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm.

[52] www.wto.org/english/docs_e/legal_e/06-gatt_e.htm.

impaired. India appealed the decision on 30 April 2016,[51] and on 13 May announced that it would bring as many as 16 claims against the United States.[52]

72. Friends of the Earth has commented: "The WTO ruling against India's National Solar Mission shows how arcane trade rules can be used to undermine governments that support clean energy and local jobs. The ink is barely dry on the Paris Climate agreement, but clearly trade still trumps real action on climate change."[53] That is paradigmatic of what is wrong with the pro-business approach to the regulatory space of States and with the so-called "Washington consensus" that consistently opposes industrial policy-making by States.[54] A United Nations campaign is needed to mainstream human rights into the work of WTO and to establish clear guidelines for dispute settlement panels giving due weight to human rights, health and environmental concerns.

VIII. Trade and human rights facilitation

73. The United Nations is the preeminent international organization and States should ensure it has the power to coordinate the work of all other international organizations, or at least to prevent them from frustrating the purposes and principles of its Charter. It is an anomaly that other organizations like WTO, the World Bank and the International Monetary Fund (IMF), as well as non-State actors, including transnational corporations, are competing with the United Nations in setting the world agenda and have a negative impact on the enjoyment of human rights by billions of women, men, children and elderly persons. Instead of such institutional competition, greater coordination is necessary. The twenty-first century cannot afford multiple world organizations taking the international order in different and often opposite directions. The international investment regime is not a "stand-alone" legal regime; it must be made to conform with the Charter of the United Nations and international human rights treaties. The so-called "fragmentation of international law" does not mean that conflicting legal regimes can function simultaneously and that conflict should be settled by three private arbitrators. Human rights are too important to be subordinated to mercantilism.[55] In case of conflict, only the highest public courts can decide in the light of the totality of international law. Until amended by States Members, the Charter of the United Nations remains the principal treaty that determines the structure and functioning of the international order.

74. Article 103 of the Charter of the United Nations stipulates that all treaties must be compatible with the Charter. To the extent that aspects of trade agreements and WTO directives hinder the achievement of the purposes and principles of the Charter, including human rights and development, they must be revised. That requires the recognition that human rights are not a barrier to trade, but that trade can be a significant obstacle to the realization of human rights.

75. Saying "no" to the Trans-Pacific Partnership Agreement, the Transatlantic Trade and Investment Partnership, the Comprehensive Economic and Trade Agreement and the Trade

[51] www.wto.org/english/news_e/news16_e/ds456apl_20apr16_e.htm.

[52] www.pv-magazine.com/news/details/beitrag/india-confirms-it-will-file-16-solar-cases-against-us-under-wto-dispute_100024597/#axzz490IWaLEn.

[53] www.bbc.com/news/world-asia-india-35668342.

[54] Robert Wade, "The role of industrial policy in developing countries", in UNCTAD, *Rethinking Development Strategies after the Global Financial Crisis*, vol. I, pp. 67-80; Jose Salazar-Xirinachs, Irmgard Nübler and Richard Kozul-Wright (eds.), *Transforming Economies: Making industrial policy work for growth, jobs and development* (Geneva, ILO, 2014).

[55] Juan Hernandez Zubizarreta and Pedro Ramiro, *Contra la ley mercatoria* (Barcelona, Icaria editorial, 2015).

in Services Agreement will not have apocalyptic consequences, bring world trade to a grinding halt or make FDI stop flowing. Henceforth trade must be made to benefit all in society, not only transnational corporations. Objectively there is no need for more free trade agreements, which hitherto have engendered advantages for few and disadvantages for many. A corporate takeover of State functions subverts States' constitutional order and renders the fulfilment of human rights treaty obligations impossible. The world economy before free trade agreements and investor-State dispute settlement was certainly not business-unfriendly and it prospered through a healthy level of trade.

76. Thus, the debate is not whether there should be "free trade" or not. The benefits of responsible free trade are not questioned. Jacking up tariffs or returning to self-supporting communities with no commercial exchanges are not imaginable. The choice is not between "anything-goes" and totalitarianism. Trade with a conscience and democratic controls promotes development while respecting transparency and accountability. Governments, parliaments and courts are reminded of their responsibility to act to achieve a just international economic order in the sense of General Assembly resolution S-6/3201 of 1 May 1974.

IX. A treaty making the Guiding Principles on Business and Human Rights binding

77. A democratic and equitable international order, as prescribed in the Charter of the United Nations, cannot be achieved through deregulation of trade, markets and financial services. While enterprises deserve protection from corrupt Governments and arbitrary expropriations, Governments also need protection from bribery and corruption by investors, speculators and transnational corporations. Individuals and peoples deserve protection and remedies against corporate abuse, land-grabbing and exploitation.

78. Observers have long decried the anomaly that while businesses have secured privileged protection of their investments and have created privatized arbitral tribunals to enforce their view of the "law", there is no tribunal to protect Governments from business abuse and no protection of individual victims from the negative consequences of business activities. That normative asymmetry must be corrected.

79. Fifty years after the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, there is still no enforcement mechanism. That reduces the credibility of United Nations institutions that continue adopting "Views", declarations and resolutions, which many States and non-State actors ignore. While there are enforcement mechanisms for trade and other agreements in WTO and investor-State dispute settlement, it is imperative to create them globally for human rights treaties. The promise of the United Nations Global Compact and the Guiding Principles on Business and Human Rights has not been realized, simply because self-regulation never works.

80. Binding obligations on investors and corporations must be incorporated into trade and investment agreements, and public courts must have jurisdiction to examine violations and impose sanctions on violators. Although the Guiding Principles are based on hard law, they are violated with impunity, as illustrated by bilateral investment treaties and free trade agreements that encroach into the regulatory space of States. The treaty should provide for its own monitoring and enforcement body or be incorporated into the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as optional protocols, stipulating that decisions are legally binding, as are those of the Inter-American Court of Human Rights and the European Court of Human Rights. States must enact civil and penal legislation concerning the human rights impacts of

business activity, the doctrine of State responsibility should be invoked to make abuses justiciable where the enterprises operate or are registered.

81. In June 2014, the Human Rights Council adopted resolution 26/9 creating an inter-governmental working group with the mandate to draft such an instrument.[78] In July 2015, the first session of the working group was held in Geneva;[79] its second session is scheduled to be held in October 2016 and deserves the support of all States and civil society. The Forum on Business and Human Rights[80] contributes to that process.

82. Beyond the treaty, there is an urgent need to strengthen national and international penal law, including anti-trust legislation, to address cases of corruption, fraud, bribery,[81] money-laundering, conspiracy, collusion, tax evasion, insider-trading, looting of pension funds, and reckless endangerment of life and the environment. In that context, the United Nations Convention against Corruption and the United Nations Office at Vienna could advance the process. Also pertinent is the United Nations Convention against Transnational Organized Crime, as certain activities of mining enterprises, including gold, diamond and coltan mining,[82] as well as the ivory trade,[83] entail criminal acts and gross human rights violations.

83. A treaty on corporate legal responsibility should not stop at defining the civil liability of transnational corporations. There must also be penal responsibility when corporate actions cause death or grievous harm, and when they destroy landscapes and the common heritage of mankind. Indeed, some activities of petroleum, gas and mining enterprises constitute a major attack on the environment, accompanied by reckless endangerment of millions of peoples' lives. Such attacks, perpetrated not only by legal persons, but by individuals sitting in corporate boardrooms, may well be justiciable as crimes against humanity pursuant to article 7 (1) (k) of the Rome Statute of the International Criminal Court. In cases where business activity causes the involuntary displacement of populations, article 7 (1) (d) applies. The Nuremberg Trials showed the way in prosecuting and convicting business executives of the I.G. Farben, Flick and Krupp companies because of their complicity in Nazi crimes. In 1946 Bruno Tesch, a business executive responsible for the production of Zyklon B, was tried and convicted. Today the penal responsibility of enterprises producing indiscriminate weapons such as landmines, cluster bombs, depleted uranium ammunition and white phosphor can and must come before the International Criminal Court. There is no justification for business executives enjoying impunity. Universal jurisdiction should be tested in appropriate cases.

84. Hitherto, victims of corporate abuses were left without adequate recourse or remedy. That poses a serious challenge to the Human Rights Council and calls not only for diagnoses but for concrete recommendations and implementable solutions. The strengthening of the human rights enforcement system is necessary to counter the prevalent architecture of corporate impunity.

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[78] http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions.

[79] Kinda Mohamadieh and Daniel Uribe, "Business and Human Rights", *South Bulletin*, vols. 87-88, 23 November 2015. On 25 September 2015, Pope Francis said before the General Assembly: "We must avoid every temptation to fall into a declarationist nominalism which would assuage our consciences. We need to ensure that our institutions are truly effective in the struggle against all these scourges". http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150925_onu-visita.html.

[80] www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx.

[81] www.theage.com.au/interactive/2016/the-bribe-factory/day-1/the-company-that-bribed-the-world.html.

[82] www.congoweek.org/en/coltan-facts.html.

[83] http://iworry.org/crisis/?gclid=COnuwKXxks0CFVIaGwod6hMH2g.

X. Preventive and corrective action

85. **While endorsing the analyses of economists, sociologists and jurists, including Jeronim Capaldo,[64] Noam Chomsky,[65] Michael Hudson,[66] Deborah James,[67] George Kahale,[68] Richard Kozul-Wright,[69] Isabel Ortiz,[70] Max Otte,[71] Lauge Poulsen,[72] Jeffrey Sachs,[73] Joseph Stiglitz,[74] Gus van Harten[75] and Robert Wade,[76] and relying on the studies of other rapporteurs and working groups, the Independent Expert deems it urgent to demand that the Human Rights Council take action so that their good proposals are not rendered irrelevant by the corporate "so what?" Transnational corporations have become a kind of Leviathan that must be tamed. Indeed, every exercise of power, political or economic, that affects people's lives must be subject to democratic controls and compatible with the purposes and principles of the Charter of the United Nations. It is that spirit that has prompted the following recommendations.**

To States

86. **States should impose a moratorium on the execution of investor-State dispute settlement awards until the entire system is tested by the International Court of Justice. A new multilateral treaty should be elaborated stipulating that courts may not execute such awards without verifying their compatibility with human rights treaty obligations and *ordre public*.**

87. **States should refrain from entering into new bilateral investment treaties and free trade agreements, including the Trans-Pacific Partnership Agreement, the**

[64] https://stopttipitalia.files.wordpress.com/2014/02/capaldottip_rejoinder.pdf.

[65] Noam Chomsky, *Who Rules the World?* (London, Penguin, 2016); www.youtube.com/watch?v=P2lsEVlqts0.

[66] www.counterpunch.org/2016/05/11/the-dangers-of-free-trade-agreements-ttips-threat-to-europes-elderly/; Michael Hudson, *Killing the Host* (Petrolia, Counterpunch Books, 2015).

[67] www.globalexchange.org/events/speaker/deborah-james.

[68] Douglas Thomson, "Kahale calls for overhaul of BIT system", *Global Arbitration Review*, Vol. 9, No. 3 (11 April 2014); www.chambersandpartners.com/global/person/50001/george-kahale-iii.

[69] www.euractiv.com/section/trade-society/news/un-blasts-eu-for-backing-global-deal-for-isds-but-not-for-country-bailouts/.

[70] www.ilo.org/newyork/events-and-meetings/WCMS_237980/lang--en/index.htm; www.ilo.org/global/docs/WCMS_214366/lang--en/index.htm.

[71] www.youtube.com/watch?v=P_HBjYZBWH0. Max Otte calls investor-State dispute settlement "a complete disempowerment of politics".

[72] www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf; www.rowmaninternational.com/books/rule-makers-or-rule-takers.

[73] www.theguardian.com/global-development-professionals-network/2015/mar/24/could-the-ttip-trade-deal-undo-development-gains; www.huffingtonpost.com/roger-hickey/economist-jeffrey-sachs-s_b_5823918.html.

[74] Joseph Stiglitz, *Rewriting the Rules of the American Economy* (New York, W.W. Norton, 2015); *The Great Divide: Unequal Societies and what we can do about them* (New York, W.W. Norton, 2015).

[75] http://thetyee.ca/Opinion/2016/01/18/TPP-Foreign-Investors/; http://thetyee.ca/Opinion/2013/11/12/Harper-Gives-Up-Sovereignty/.

[76] Robert Wade "Growth, inequality, and poverty: arguments, evidence, and economists", in *Global political economy*, John Ravenhill, ed. (Oxford, Oxford University Press, 2014); "Current thinking about global trade policy", *Economic and Political Weekly*, vol. 49, No. 6 (8 Feb. 2014); "'Market versus State' or 'market with State': how to impart directional thrust", *Development and Change*, vol. 45, No. 4 (July 2014).

Transatlantic Trade and Investment Partnership, the Comprehensive Economic and Trade Agreement and the Trade in Services Agreement, unless human rights, health and environmental impact assessments have been conducted, and unless there is full disclosure, consultation with stakeholders and public participation. Where possible, referendums should be conducted.

88. **States should test the legality of provisions of bilateral investment treaties and free trade agreements, investor-State dispute settlement and investment court system mechanisms, as well as WTO rules and practice, for compatibility with their own Constitutions and with their human rights treaty obligations.**

89. **States may consider invoking the inter-State procedures of the Human Rights Committee (International Covenant on Civil and Political Rights, art. 41) and of regional human rights courts. European States should test the compatibility of the Comprehensive Economic and Trade Agreement and the Transatlantic Trade and Investment Partnership with their human rights obligations before the European Court of Human Rights. American States should test the compatibility of trade agreements with the American Convention on Human Rights. African States should test compatibility with the African Charter on Human and Peoples' Rights. States members of the European Union should test the constitutionality of trade agreements before the European Court of Justice.**

90. **States should conduct ex post human rights, health and environmental impact assessments in connection with existing trade agreements and modify them where necessary.**

91. **States should cooperate with the inter-governmental working group on the drafting of a binding treaty on corporate social responsibility and adopt it expeditiously. The treaty should put teeth on the Guiding Principles on Business and Human Rights and provide for monitoring and enforcement mechanisms. The treaty should give recourse and remedy to victims of abusive activities by transnational corporations.**

92. **States should implement the Doha Development Agenda as envisaged in Sustainable Development Goal 17.10. The Trade Facilitation Agreement must not become operative until the Doha Development Agenda commitments have been met.**

To parliaments

93. **No parliament should approve trade agreements without exercising oversight functions and examining the compatibility of the agreements with human rights treaty obligations in the light of impact assessments.**

94. **Parliaments should make it illegal for treaty negotiators to agree to anti-democratic lock-in periods in investment treaties.[78] The adding of riders to existing bills without democratic debate is inacceptable.**

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[77] On 4 May 2016, the European Court of Justice upheld the 2014 Tobacco Products Directive against challenges from British-American Tobacco (BAT) and Philip Morris, http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-05/cp160048en.pdf?version=meter+at+null&module=meter-Links&pgtype=article&contentId=&mediaId=&referrer=https%3A%2F%2Fwww.google.ch%2F&priority=true&action=click&contentCollection=meter-links-click.

[78] Typically they range from 10 to 30 years in investment treaties, when one accounts for the minimum terms plus survival clauses. The Independent Expert is not aware of other treaties that have such long

95. **Parliaments should invoke the pertinent revision and termination procedures laid out in the Vienna Convention on the Law of Treaties to modify commercial treaties and abolish investor-State dispute settlement.**

96. **Parliaments and IPU should intensify their cooperation with WTO in the field of human rights, health and the environment.**

To domestic courts

97. **National courts and tribunals should execute foreign arbitral awards only after examining their legitimacy in the light of human rights treaty obligations. Arbitral awards that encroach on the regulatory space of States should be rejected as contrary to domestic and international *ordre public*. The public policy exception contained in article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards should be used systematically to prevent interference in fundamental State functions.**

To the International Court of Justice

98. **The International Court of Justice should pronounce in appropriate contentious cases or in an advisory opinion on the *erga omnes* obligations of States to comply with the human rights treaty regime. No trade agreement, investor-State dispute settlement or investment court system may obstruct the fulfilment of human rights treaty obligations. The supremacy clause of the Charter of the United Nations (Article 103) and general principles of law, including good faith, the prohibition of treaties that are *contra bonos mores* and the prohibition of abuse of rights, override conflicting trade agreements and arbitral awards.**

To the World Trade Organization

99. **WTO should mainstream human rights into all of its activities and issue directives to the dispute settlement panels so that human rights treaty violations are not adversely affected.**

100. **WTO dispute panels should interpret the exceptions in the General Agreement on Tariffs and Trade 1994 to support initiatives on food security, health and the environment and facilitate solutions to climate change. WTO should harmonize policies with the Food and Agriculture Organization of the United Nations (FAO) and OHCHR.**

To the United Nations Conference on Trade and Development

101. **UNCTAD should convene a world conference to revise existing bilateral investment treaties and free trade agreements, abolish investor-State dispute settlement and declare the investment court system incompatible with United Nations constitutional law.**

To national human rights institutions and civil society organizations

102. **National human rights institutions and civil society organizations should assist in conducting human rights, health and environmental impact assessments. They should disseminate information on commercial treaties and their human rights impacts and demand that referendums be held.**

lock-in periods that hinder future elected Governments from revisiting treaties. Democratic Governments must never be bound by such treaties generation after generation.

To the Human Rights Council

103. **The Human Rights Council should become the international arena where Governments compete to show how to implement human rights most effectively, how to strengthen the rule of law and how to achieve social justice. Competition in human rights performance is the best kind of competition. The Human Rights Council should become the preeminent forum where Governments elucidate best practices in good-faith implementation of pledges, expansive interpretation of human rights treaties and inclusion of all stakeholders. The Human Rights Council must not be a politicized arena where States instrumentalize human rights as weapons to defeat their political adversaries, where human rights are undermined through "side shows", the "flavour of the month", or where international law is applied a la carte.**

XI. Postscript

104. **The Independent Expert endorses Lawrence Summers' recent comments in the *Financial Times*: "The promotion of global integration can become a bottom-up rather than a top-down project ... This would mean a shift from international trade agreements to international harmonization agreements, where issues such as labour rights and environmental protection would take precedence over issues related to empowering foreign producers."**

105. **The credibility of the special procedures depends in part on the implementation of the recommendations of special rapporteurs and working groups, whose reports are only briefly discussed, filed away and forgotten. When the special procedures were established, it was surely not the intention of States to convene an assembly of Cassandras, whose findings and warnings would be systematically ignored. Our moral vertigo over gross violations of human rights should not result in paralysis, but generate robust action. A properly funded follow-up mechanism should be established to monitor and benchmark the extent to which special rapporteurs' recommendations are considered. The mandate of a special rapporteur on follow-up should be established. The universal periodic review procedure and OHCHR advisory services could further assist in implementation.**

106. **By way of conclusion, the Independent Expert reiterates his expression of appreciation to the committed, hard-working and competent OHCHR staff, and requests the Human Rights Council and the General Assembly to ensure that considerably greater resources are allocated to OHCHR.**

www.ft.com/cms/s/2/5e9f1a5e-1f09-11e5-99cb-83242733f755.html#axzz4C6q6R1gt

Annex I

Activities of the Independent Expert since the last report

- Participation at side-events during the 30th, 31st and 32nd sessions of the HR Council and side-events during UPR sessions.
- 20 July: Lecture on transnational organizations and human rights, University of Jaén.
- 25 September: Lecture on the rights of children in UN monitoring bodies, University of Leiden.
- 30 September: WTO Public Forum, Geneva.
- 13 October: Expert Consultation on Trade and Investment and Human Rights, Geneva.
- 15 October: Lecture at the European Parliament and Bi-laterals with European Commission representatives to discuss the proposed Investment Court System, Brussels.
- 5 November: Lecture on "The UN's contribution to democracy" at the Leuven Centre for Global Governance Studies.
- 27-28 January: Lecture at the conference "Strategy meeting on catalysing reform of trade negotiation processes", organized by the Electronic Frontier Foundation/Open Society Foundations, Brussels.
- February-March: Bilateral consultations with South Centre, Geneva.
- 19 April: Keynote speaker at the Parliamentary Assembly of the Council of Europe, Strasbourg.
- 28 April: Conference on CETA and TTIP organized by Food Watch, Paris.
- 12 May: Bilateral consultations with WTO secretariat, Geneva.
- 23 May: Bilateral consultations with Lelio Basso Foundation, Geneva.
- 26 May: Bilateral consultations with IPU trade expert, Geneva.
- 2-3 June: CETIM conference on transnational corporations, Barcelona.
- 6-10 June: Annual meeting of Special Procedures, Geneva.
- 10 June: Working lunch on UN Reporting of Violence against Women in Politics organized by the National Democratic Institute, Geneva.
- 13-14 June: Annual Session of the Parliamentary Conference on the WTO organized jointly by the Inter-Parliamentary Union and the European Parliament, Geneva.
- 22 June: Keynote speaker at a meeting on trade and human rights organized by the NGO Committee on Development, Geneva.
- 3-4 July: Seminar on International Criminal Law, organized by the Lelio and Lisli Basso ISSOCO Foundation, Rome.

Annex II

Excerpt of the Conclusions and Recommendations of the G-77 High- Level Panel of Eminent Personalities of the South. The Future Architecture of South-South Cooperation: Challenges and Opportunities held in Bangkok, Thailand, 9-10 March 2016

In this context, Investor-State-dispute settlement (ISDS) arbitration agreements should be rejected and those currently in existence should be abolished, because ISDS is incompatible with international ordre public and its mere existence has led to a dangerous "regulatory chill" and consequent violations of the international human rights treaty regime. The ontological function of States is to legislate and regulate in the public interest and the International Covenant on Civil and Political Rights (ICCPR) reaffirms that all suits at law (including investment disputes) must be adjudicated by independent tribunals that respect the principles of transparency and accountability. Creation of a privatized system of dispute settlement is incompatible with the obligations under the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Private arbitrators cannot replace the system of public justice, which is an achievement of the rule of law.

Annex III

Questionnaire of the Independent Expert on the promotion of a democratic and equitable international order on the impact of WTO agreements, rules and practice on human rights, particularly food security

Brief responses are welcome (e.g. in bullet points) and are not required for all questions.

This questionnaire is addressed to member and observer States of the World Trade Organization (WTO), inter-governmental organizations and civil society organizations. The identity of civil society organizations, should they so wish, will remain confidential (only the country where they operate may be disclosed).

Priorities of the WTO

1. Some countries, particularly developed countries, are proposing to introduce "new issues" into the WTO agenda, including investment, competition policy, government procurement and e-commerce, along the lines that have been shaped in the Trans-Pacific Partnership (TPP) or which are shaping up in the Transatlantic Trade and Investment Partnership (TTIP). There is, however, a pending agenda to be addressed — including issues of agriculture reform (e.g. removal of developed country subsidies e.g. cotton), the strengthening of Special and Differential Treatment flexibilities for developing countries to have more policy space for industrialization etc. What should be the WTO's priorities and why?

2. What measures, if any, are envisaged or have been adopted to mainstream human rights into all WTO activities, including guidelines for WTO dispute settlement panels? How can WTO ensure that the human rights treaty obligations of WTO member States are not compromised by WTO rules and that the human rights treaty regime is always taken into account when elaborating, negotiating, adopting or implementing WTO policy, agreements and rules.

Impact Assessments and other measures

3. Please provide examples of how measures, such as opinion polling, consultation of all stakeholders, human rights, health and environmental impact assessments have been used prior to the adoption of past WTO rules and recommendations, and how these mechanisms may be effectively employed in current negotiations.

4. The Special Rapporteur on the right to food, Olivier de Schutter, proposed that the WTO Secretariat should, "Maintain and deepen the existing constructive dialogue with the Office of the United Nations High Commissioner for Human Rights. Encourage WTO members to conduct human rights impact assessments prior to the conclusion of trade agreements or to accepting new schedules of commitments". To what extent have his recommendations been implemented?[3]

[3] http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/10/5/Add.2.

Negotiation, ratification and implementation process

5. How and to what extent can all stakeholders participate in the negotiation, ratification and implementation of WTO agreements, for example the TRIPs Agreement, to ensure that ecosystems are preserved and human rights are respected, protected and fulfilled in this regard, and that food security and access to generic drugs are promoted and not delayed or undermined. Please include best practices and recommendations for meaningful consultation and participation in these processes.

6. Numerous States and non-governmental organizations have criticized a lack of transparency and inclusiveness during the WTO Nairobi Ministerial Conference. What procedures should be put in place so that Ministerial Conferences do not end up presenting what is effectively an ultimatum text at the final hour with no opportunity for the majority of delegations to negotiate but merely an option to give an up or down vote? How can the negotiating texts be responsive to the concerns of the majority of WTO Members and not just the powerful?

7. The WTO Doha Round remains on-going as there was no consensus to close it in Nairobi. Heads of States at the 2015 Sustainable Development Summit agreed to "promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda" (target 17.10).[b] Is your government supporting the implementation of the Doha Development Agenda? If not, why not?

Conflict of laws

8. Bearing in mind that the UN Charter is akin to a world constitution, and that Article 103 of the Charter is effectively a supremacy clause, any conflict with other treaties must give precedence to the UN Charter. However, WTO law operates outside the UN system. There is therefore an incoherence that needs to be addressed so that WTO rules are fully compatible with UN constitutional law. Would your government support the primacy of human rights law over trade agreements? How can WTO ensure that State measures taken for poverty alleviation, employment, food security, enjoyment of economic, cultural and social rights, health and environmental protection are not delayed or undermined by trade "imperatives". Should this issue of priorities be raised by the international community, e.g. in the UN General Assembly or before the International Court of Justice by advisory opinion?

9. Please explain what are the pros and cons of incorporating WTO into the UN family and making it work in tandem with the Purposes and Principles of the UN (Articles 57 and 63, UN Charter)?

Dispute Resolution

10. A WTO Panel recently ruled that local content requirements maintained by India for solar cells and modules violate India's national treatment obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO Agreement on Trade-Related Investment Measures (TRIMs). This decision marks the first time that a WTO Member has sought to justify a departure from WTO practice by reference to its international obligations on climate change. The argument was rejected by the WTO panel, although India invoked

[b] https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals.

its treaty obligations under the United Nations Framework Convention on Climate Change, and the exception provided for in GATT Article XX (d). This raises an issue of "fragmentation of international law". Does your country have local content policies? If yes, please give an example. The WTO's Agreement on Trade-Related Investment Measures (TRIMS) prohibits the use of local content policies in goods. Has this been an impediment to your industrialization strategies or to the promotion of local employment?

11. What are the pros and cons of creating a dispute settlement mechanism within WTO competence to examine human rights violations resulting from the application of WTO agreements, rules and regulations?

12. What other recourse and remedies would be available to States, corporations, groups and individuals, including indigenous peoples, in a situation where human rights are violated as a consequence of the application of WTO agreements concerning agriculture and the environment. Would a petitions mechanism assist in reaching friendly settlement?

Annex IV

WTO Secretariat replies to the questionnaire of the Independent Expert on the promotion of a democratic and international order

Priorities of the WTO

Question 1

- When WTO Members adopted the Nairobi Ministerial declaration[a] by consensus on 19 December 2015, they set the priorities for the WTO. The Ministerial Declaration recognizes that differences do exist on the way forward and recognizes that "Many Members want to carry out the work on the basis of the Doha structure, while some want to explore new architectures" (parag. 32 of the Ministerial Declaration).
- The Declaration highlights an important element in its paragraph 34, when it says that "any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members.
- In Paragraph 34 also, our Members have tasked officials to work towards finding ways to advance negotiations and requested the Director-General to report regularly to the General Council on these efforts.

Question 2

- WTO Members have never discussed nor adopted any specific measures to mainstream human rights into WTO activities, including in relation to dispute settlement.
- However, WTO rules do not prevent governments from implementing human rights obligations.
- The WTO recognizes the benefits of sustainable development as one of its goals. WTO agreements include sufficient policy space to allow governments to pursue legitimate objectives other than trade, including human rights.

Impact Assessments and other measures

Question 3

- All WTO bodies serve as a forum for Members to discuss specific issues and share experiences on trade and trade-related matters.
- WTO Members within the framework of these committees often request WTO Secretariat to produce analysis and factual reports on specific issues pertinent to the work of these committees.
- Given the member-driven nature of the organization, stakeholder consultations are the primary responsibility of each individual member of the WTO; For information

[a] https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairadecision_e.htm.

purposes, the WTO Secretariat reaches out to all stakeholders through the WTO Public Forum or activities in several regions in developing countries.

Question 4

- The WTO Secretariat engages actively with other international organisations and also participates in numerous joint initiatives.
- In the wake of the global food crisis in 2008, the UN Secretary General established the High Level Task Force on Global Food Security Crisis (HLTF) involving more than 20 international organizations[7] towards a coordinated and synergic response to the crisis. The WTO Secretariat has participated in the HLTF deliberations since its inception and contributed very actively to the formulation of the joint policy framework (called Comprehensive Framework of Action) to assist the various stake holders in dealing with the global food security challenge.
- Specifically on the issue of Right to Food, the Framework advises the national governments and other stakeholders to be guided by the "Voluntary guidelines to support the progressive realization of the right to adequate food in the context of food security"[8] adopted by governments at the FAO Council in 2004.
- The WTO Secretariat also contributes to and participates in other international efforts to support global food security including in the deliberations of the G20 and the Committee on World Food Security (CFS).
- In the WTO Committee on Agriculture, a number of observer international organizations are regularly invited to participate in the CoA meetings. The CoA undertakes annually a dedicated discussion on food security-related aspects relevant to LDCs and net food-importing developing countries and a number of organizations active in the domain of food security (like the FAO, WFP) are specifically invited to contribute to that debate.
- The long-term objective of the WTO Agreement on Agriculture is to establish a fair and market-oriented trading system through a programme of fundamental reform. The agricultural reform programme is furthered through the negotiations. The negotiations on agriculture take place in the context of the Special Sessions of the Committee on Agriculture and are based on WTO Members' contributions and proposals.

Negotiation, ratification and implementation process

Question 5

- The WTO TRIPS Agreement was consciously crafted and carefully negotiated to safeguard policy space, particularly in the vital area of public health. For the first time in a multilateral treaty, it expressly articulated the role of the IP system as a policy tool intended to advance broader public policy objectives: it stated that the IP system should promote both technological innovation and the transfer and

[7] Both the WTO and UN Office of the High Commissioner for Human Rights are represented on the Task Force.

[8] The guidelines recognize the primary responsibility of States for the realization of the right to food and advises them on a repertory of actions consistent with their international obligations. The agricultural reform programme launched under the Uruguay Round Agreement on Agriculture is specifically acknowledged in the Guidelines as a contributory factor to strengthening an enabling environment for the progressive realization of the right to food.

dissemination of technology, and that this should work for the mutual advantage of producers and users of technological knowledge as well as promoting social and economic welfare and a balance of rights and obligations.

- The practical experience of WTO Members implementing the Agreement has since borne out the breadth of the scope for public health policies that the TRIPS Agreement supports, both for diverse forms of innovation and for measures to leverage access to the fruits of innovation such as new medicines, as well as safeguards against abuse of IP rights.

- A major step towards policy coherence for public health for the WTO was the subsequent adoption of the Doha Declaration on the TRIPS Agreement and Public Health of December 2001 ('the Doha Declaration'). The Doha Declaration situated a multilateral trade agreement squarely within a public health context, stating that the TRIPS Agreement had to be part of wider national and international action to address public health problems. The Declaration has helped catalyse cooperation across the multilateral system to promote a more coherent and inclusive approach to innovation and access to medicines, as reflected most recently in the Sustainable Development Goals (target 3.b).

- The Doha Declaration led, on the initiative of the African Group, to a consensus among WTO Members in 2005 to establish a formal amendment the TRIPS Agreement that would remove a potential legal obstacle for countries most dependent on imports to meet their needs for affordable medicines. This was the first agreement to amend the entire package of WTO multilateral trade agreements, and it was entirely geared to ensure access to medicines for the most vulnerable.

- The Doha Declaration is also at the origin of an extended transition period for least developed country WTO Members that exempts them from the obligation to protect and enforce patents for pharmaceutical products, as well as undisclosed test data that are submitted for the purpose of obtaining marketing approval. In 2015, the LDC Group took the leadership in negotiations with all other WTO Members that ultimately led to a consensus decision to further extend the transition period until January 2033. This second extension of the transition period is an example of the all-inclusiveness of the negotiating process at the WTO. It aims at facilitating access to affordable medicines and represents a significant contribution to an early implementation of the SDG goals.

- The effect of the Doha Declaration as a catalyst for coherence at the international level was seen in its role of making public health issues a central focus of work carried out by the WTO on IP and international trade, in its inclusion in a series of World Health Assembly (WHA) resolutions on ensuring accessibility to essential medicines and public health, innovation and IP, in its use as a point of reference in the negotiations on the WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property (GSPA-PHI), and in identifying health-related flexibilities that have been dealt with under the WIPO Development Agenda, as well as in a number of important declarations and resolutions adopted by other UN bodies (e.g. UN ECOSOC High-Level Segment Ministerial Declaration, Implementing the internationally agreed goals and commitments in regard to global public health, 2009; UN Political Declaration on HIV and AIDS: Intensifying our efforts to eliminate HIV and AIDS, 2011).

- Exemplifying this coherent and inclusive approach, an active program of coordinated technical assistance and policy dialogue, led at Director General level and centred on public health imperatives, has unfolded in the form of a trilateral initiative undertaken by the WHO, WIPO and WTO. Reaching well beyond the

three specialised agencies, this program has drawn widely on diverse policy perspectives and practical experiences, to build a solid foundation of policy insights and empirical data so as to illuminate the pathway to more coherent outcomes and to build capacity in developing countries to take informed policy choices according to national needs and circumstances. This policy dialogue and technical assistance has long been consciously planned and implemented to include a wide spectrum of voices from civil society, the not for profit and philanthropic sector, diverse industry players, competition authorities, and experts from the United Nations system including UNCTAD, UNAIDS and UNDP.

- With respect to food security, there seem to be numerous concerns about the right to food and intellectual property. The fear is that farmers will get increasingly dependent on new plant varieties that are protected by IPRs and that in time this would lead to a reduction in agro-biodiversity. To the extent they concern IP protection, the TRIPS Agreement already accommodates them in significant respects through the policy space it leaves to countries. Under Article 27.3 (b) countries are not required to provide patent protection for inventions of (i) plants and animals and (ii) essentially biological processes for their production. Where Members do not provide patent protection for new plant varieties, they are required to protect plant varieties through an effective sui generis system (i.e. a system created especially for this purpose). Members also have the option of using a combination of both systems of protection, namely TRIPS provisions on patents and a sui generis system. There is no further explicit guidance in the TRIPS Agreement as to what is to be considered an effective sui generis system. These provisions have been discussed in the TRIPS Council. For, example, when the delegation of the US put forward what it considered to be an 'effective' system, this was countered by the Indian delegation. There was also a vigorous debate on whether or not TRIPS requires Members to comply with UPOV 1991, with no conclusion drawn. (See Summary prepared by the WTO Secretariat in WTO document IP/C/W/369/Rev.1, 9 March 2006, 16-20 and 20-24.) Further, Article 27.2 allows WTO Members to exclude from patentability inventions whose commercial exploitation they find necessary to prevent to protect human, animal or plant life or health or to avoid serious prejudice to the environment. This provision could be used, for example, to exclude GM crops, provided the member also prevents the commercial exploitation of such products in its territory.

Question 6

- The Nairobi Ministerial Declaration was adopted by consensus and incorporates a number of decisions such as on Agriculture (Export Competition, Special Safeguard Mechanism for Developing Country Members; Public Stockholding for Food Security Purposes), Cotton and LDC issues (Preferential Rules of Origin for Least developed countries; Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade).
- It reiterates the importance of LDCs, Small and Vulnerable Economies (SVEs) and Art. 12 Members … and pledges to work towards keeping Development at the heart of the negotiations.
- Part III of the Declaration clearly reflects the different views that WTO Members have on the way forward for the organization.

- That being said, the Director-General and some members have stressed that "the preparatory process for Ministerial Conferences can be improved in order to maintain transparency and inclusivity throughout the process".[4]

Question 7

- This question seems to be addressed to governments and not to the WTO Secretariat.

International law

Question 8

- The WTO regularly associates itself with the objectives and activities of the UN such as the MDGs and now the SDGs; it contributes actively to work of ECOSOC work as well as on Financing for Development. The WTO is an active participant in the UNCEB and its subsidiary bodies, and works closely with numerous UN Specialized Agencies such as UNCTAD, ILO, FAO, WIPO and WHO. The WTO also has a coherence mandate with the World Bank and the IMF.
- However, the decision for the WTO to be an independent intergovernmental organization was taken unanimously by its founding members in 1995. Only WTO members are in a position to respond to questions in relation to that decision, and subsequently, its effect and resulting functioning.

Dispute Resolution

Question 9

- The WTO dispute settlement mechanism applies to disputes between WTO Members regarding Members' rights and obligations under the WTO agreements. It does not provide panels or the Appellate Body with jurisdiction to decide on violations of non-WTO agreements.
- So far, no WTO Member has ever made an allegation that the application of WTO rules has led to a violation of a Member's human rights obligations.
- WTO rules leave sufficient policy space for governments to be able to respect and implement at the same time both their WTO obligations and their human rights commitments.

Question 10

- Corporations and individuals may pursue their claims before domestic courts.
- Disputes between two States involving an alleged violation of a human rights treaty may be brought before the International Court of Justice or other specific adjudicatory bodies designated by the parties.
- It has been made clear in several trade disputes adjudicated under the WTO dispute settlement mechanism that governments are entitled to prioritize national environmental policies over their trade obligations.
- The GATT permits WTO Members to impose export restrictions to prevent or relieve critical shortages of foodstuffs.

[4] https://www.wto.org/english/news_e/news16_e/hod_10feb16_e.htm.

- We are not aware of a single allegation to the effect that human rights are violated as a result of the application of WTO agreements.
- The Committee on Trade and Environment (CTE) provides a forum where WTO Members share their experiences, concerns and best practices on trade and environmental policies.
- It has contributed to identifying and understanding the relationship between trade and the environment in order to promote sustainable development ("triple win opportunities" for trade, development and the environment).
- Members of the CTE are also regularly briefed by specialized environmental institutions on topical subjects in the intersection between trade and environment.
- In recent years, several important issues have been discussed in the CTE including: efforts to combat illegal logging; sustainability labelling schemes; carbon foot-print methodologies; renewable energy initiatives.

Annex V

2016 Annual Session of the Parliamentary Conference on the WTO — Outcome Document, June 2016

We appreciate the decision on public stockholding for food security purposes and call for the conclusion of negotiations on finding a permanent solution to the issue, in keeping with the decision. We believe that the issue of food security is vital for developing countries and that WTO rules must support efforts to combat hunger. In line with the same decision, we also want to stress the importance of a speedy adoption of a proposal for a Special Safeguard Mechanism, in conformity with the Nairobi Ministerial Decision on the issue.

We urge WTO Members to capitalize on the momentum created by recent progress, bearing in mind the strategic objective of strengthening the multilateral trading system and the need to consolidate the WTO as the centre of trade negotiations, while at the same time recognizing that new approaches will be necessary. Flexibility, openness, inclusiveness and political engagement will be key to advancing on all the remaining issues of the Doha Development Agenda (DDA). Since the Doha Round was launched in 2001, the world has changed dramatically in economic, political and technological terms. New challenges such as e-commerce, digital trade and international investment can also be discussed without prejudice to outstanding issues of the DDA.

Annex VI

Selected Bibliography

- Yilmaz Akyüz, Internationalization of Finance and Changing Vulnerabilities in Emerging and Developing Economies, South Centre, Geneva, 2015.
- Wolfgang Alschner, "Regionalism and Overlap in Investment Treaty Law — Towards Consolidation or Contradiction?" Journal of International Economic Law 17(2): 271-298, 2014.
- Jose Alvarez,
    - The Evolving International Investment Regime, Oxford, 2011.
    - The Public International Law Regime Governing International Investment, Martinus Nijhof, Leiden 2011.
    - International Organizations as Law-Makers, Oxford, 2005.
- Jose Alvarez, Karl P. Sauvant, Kamil Girard Ahmed and Gabriela P. Vizcaino (eds.). The Evolving International Investment Regime: Expectations, Realities, Options, Oxford University Press, 2011.
- Todd Allee and Clint Peinhardt, "Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions", International Studies Quarterly 54 (1): 1-26, 2010.
- Todd Allee, and Clint Peinhardt, "Contingent Credibility: The Impact of Investment Treaty violations on Foreign Direct Investment", International Organization 65 (3): 401-432, 2011.
- Aviva, A Roadmap for Sustainable Capital Markets: How can the UN Sustainable Development goals harness the global capital markets? London, 2015.
- Gonzalo Berrón and Brid Brennan, International Peoples Treaty on the Control of Transnational Corporations, Base Document for Global Consultation, 2014.
- Juan Pablo Bohoslavsky and Horacio Verbitsky, Cuentas Pendientes, Siglo XXI Editores, 2013.
- Francis Boyle, World Politics and International Law, Duke University Press, 2012.
- Alfredo Calcagno, "Rethinking Development Strategies after the Global Financial Crisis" in UNCTAD, Rethinking Development Strategies after the Global Financial Crisis, Vol. I, pp. 9-26.
- Amélie Canonne avec Johan Tyszler et Lucile Falgueyrac, Le TAFTA avant l'Heure. Tout comprendre au traité UE-Canada, Association Internationale de techniciens, experts et chercheurs, Montreuil, 2016.
- Carska-Sheppard, Andrea, "Issues Relevant to the Termination of Bilateral Investment Treaties", Journal of International Arbitration 26(6): 755, 2009.
- Noam Chomsky, Who rules the world? Penguin, 2016.
- Natasha Cingotti, Pie Eberhardt, Nelly Grotenfeldt, Celilia Olivet and Scott Sinclair, Investment Court system put to the test, Corporate Europe Observatory, Teransnational Institute, Friends of the Earth Europe, Brussels, 2016.

- Corporate Europe Observatory,
  - Profiting from Injustice, Brussels, 2012.
  - Profiting from Crisis, Brussels, 2014.
  - Le dangereux duo reglementaire. Comment la cooperation reglementaire transatlantique sous le TTIP permettra a l'administration et aux grands entreprises de s'en prendre aux intérêts publics, 2016.
  - The Zombie ISDS. Rebranded as ICS, rights for Corporations to sue States refuse to die. Brussels, 2016.
- Carlos Correa, Trade related aspects of intellectual property rights, Oxford 2007.
- Lorenzo Cotula, "Do Investment Treaties Unduly Constrain Regulatory Space?" Questions of International Law 9: 19-31, 2014.
- David Cronin, Corporate Europe. How Big Business Sets Policies on Food, Climate and War, Pluto Press, London, 2013.
- Zach Elkins, Andrew T. Guzman and Beth Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" International Organization 60:4: 811-846, 2006.
- Gabriel Felbermayr, Rahel Aichele, How to make TTIP inclusive for all? Global Economic Dynamics, Bertelsmann Stiftung, Leibnitz Institut für Wirtschaftsforshung, Muninch, 2015.
- Jean Feyder, La Faim tue, Preface Jean-Claude Juncker, L'Harmattan, Original title *Mordshunger*, Westend Verlag, 2010.
- Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", Fordham Law Review 73(4): 1521-1625, 2005.
- Baltasar Garzón,
  - La Fuerza de la Razón, Editorial Debate, 2012.
  - "Jurisdicción universal" http://baltasargarzon.org/jurisdiccion-universal/.
- Andrew Guzman,
  - "Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" Virginia Journal of International Law 38: 639-688, 1998.
  - "Against Consent" Virginia Journal of International Law 52(4): 747-790, 2011.
- Yoram Haftel, and Alexander Thompson, "Delayed ratification: the domestic fate of bilateral investment treaties", International Organization 67 (2): 355-387, 2013.
- Juan Hernandez Zubizarreta, The new global corporate Law, Transnational Institute, 2015.
- Juan Hernandez Zubizarreta y Pedro Ramiro, Contra la Lex Mercatoria, Icaria, 2015.
- Sarah Joseph, Blame it on the WTO? A Human Rights Critique, Oxford, 2011.
- D. Kinley, J.M., Waincymer, (eds), The World Trade Organization and Human Rights: Interdisciplinary Perspectives, Edward Elgar, Cheltenham 2009.

- Margie-Lys Jaime. "Relying on Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements". Georgetown Journal of International Law 46: 261-313, 2014.
- Srividya Jandhyala, J. Witold, J. Henisz and E. Mansfield. "Three Waves of BITs: The Global Diffusion of Foreign Investment Policy". Journal of Conflict Resolution 55 (6): 1047-1073, 2011.
- Daniel Stedman Jones, Masters of the Universe: Hayet, Friedman and the Birth of Neo-Liberal Politics, Princeton University Press, 2012.
- Jeff King, The Doctrine of Odious Debt in International Law, Cambridge Studies in International and Comparative Law, Cambridge, 2016.
- Naomi Klein, The Shock Doctrine, Knopf, Canada, 2007.
- Jürgen Kurtz, "Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication." ICSID Review 27(1): 65-86, 2012.
- Federico Lavopa, Lucas Barreiros, and Victoria Bruno. "How to Kill a BIT and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties". Journal of International Economic Law 16 (4): 869-891, 2013.
- J. Aloysius Llamzon, Corruption in International Investment Arbitration'? Oxford 2014.
- George Monbiot, How did we get into this mess? Verso 2016.
- Jane Mayer, Dark Money, Doubleday, New York, 2016.
- Joyce Naar, Samenwerking in wederzijds belang en onderlinge afhankelijkheid : een beschrijving en analyse van de ACP-EG-partnerschapsovereenkomst (A description and analysis of the ACP-EU-Partnership-agreement. Co-operation on the basis of mutual interest and in the spirit of interdependence), 2002.
- Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, The EU Charter on Human Rights.
- Bloomsbury Publishing, 2014.
- J. Pohl, K. Mashigo and A. Nohen. Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey, OECD Working Papers on International Investment, 2012/02. http://dx.doi.org/10.1787/5k8xb71nf628-en.
- Pope Francis,
  - Encyclical Letter Amoris Laetitia — (on the family), Rome, 2016.
  - Laudato Si (on protection of the environment), Rome, 2015.
- Lauge Poulsen,
  - Bounded Rationality and the Diffusion of Modern Investment Treaties. International Studies Quarterly 58: 1-14, 2014.
  - Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries. Cambridge: Cambridge University Press, 2015.
  - Sacrificing Sovereignty by Chance, Ph.D. Dissertation, LSE 2011.
- Lauge Poulsen, and Emma Aisbett. "When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning." World Politics 65 (2): 273-313, 2013.

- Anthea Roberts, Pierre-Hugues Verdier, Mila Versteeg and Paul B. Stephan, eds., Who Cares about Regulatory Space in BITs? A Comparative International Approach. Tomer Broude, Hebrew University of Jerusalem Yoram Z. Haftel, Hebrew University of Jerusalem Alexander Thompson, Ohio State University (forthcoming in Comparative International Law, (Oxford University Press, 2016.) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773686.
- Andrew Sayer, Why We Can't Afford the Rich, Bristol University, 2015.
- Karl Albrecht Schachtschneider, Souveränität, Duncker & Humblot, Berlin, 2015.
- Stephan Schill, "Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?" Journal of International Arbitration 24 (5): 469-477, 2007.
- R. Shamir, "La responsabilidad social empresarial: un caso de hegemonía y contrahegemonía", in B. Sousa, (ed.), El derecho y la globalización desde abajo, Barcelona, Anthropos, 2007.
- Vandana Shiva, 2013, Making Peace With The Earth, Pluto Press 2013.
- Kavaljit Singh, Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices, 2016.
- Adam Smith, Inquiry into the Nature and Causes of the Wealth of Nations, 1776, Reprinted Modern Library, New York, 1937.
- South Centre, Approaches to International Investment Protection: Divergent Approaches between the TPPA and Developing Countries' Model Investment Treaties, Geneva, 2016.
- Suzanne Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements", Journal of International Economic Law 13 (4): 1037-1075, 2010.
- Joseph Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future, W.W. Norton, New York, 2012.
    - and Bruce Greenwald,Creating a learning society, a new approach to growth, development, and social progress. Columbia University Press, New York, 2014.
    - The great divide: unequal societies and what we can do about them. W.W. Norton, New York, 2015.
    - and B. Greenwald,Creating a learning society: a new approach to growth, development, and social progress. Columbia University Press, New York, 2015.
- Yash Tandon, Trade is War, OR Books, New York, 2015.
- Alejandro Teitelbaum,
    - La armadura del capitalismo. El poder de las sociedades transnacionales, Icara, Barcelona, 2010.
    - Trabajar eficazmente para poner límites al poder económico transnacional, 2016 http://www.rebelion.org/noticia.php?id=197541.
    - El papel desempeñado por las ideas y culturas dominantes en la preservación del orden vigente, Editorial Dunken, Buenos Aires, 2015.

- La armadura del capitalismo. El poder de las sociedades transnacionales en el mundo contemporáneo, Antrazyt, 2010.

- Transnational Institute, Socialising losses, privatizing gains. How Dutch investment treaties harm the public interest, Amsterdam, 2015,

  - State of Power, 2015.

  - State of Power 2016. Democracy, sovereignty and resistance. TTIP: Why the World should beware, 2015.

- Antonios Tzanakopoulus. (forthcoming). "Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation". In States' Reassertion of Control over International Investment.

- Gus van Harten,

  - Investment Treaty Arbitration and Public Law, Oxford, 2007.

  - Public Statement on the International Investment Regime. http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/.

  - Key Flaws in the European Commission's proposal for Foreign Investment Protection http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122.

  - Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration (Oxford University Press), 2013.

- Carl Wellman, The Moral Dimension of Human Rights, Oxford University Press, 2010.

- Jason Yackee. "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Sources of Evidence," Virginia Journal of International Law 51:2. 2010.

- United Nations, A New Global Partnership: Eradicate poverty and Transform Economies Through Sustainable Development, The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, May 2013.

- UN Global Compact, Corporate Sustainability and the United Nations Post-2015 Development Agenda, 17 June 2013.

- UNCTAD. 2000. Bilateral Investment Treaties 1959-1999. New York and Geneva: United Nations. UNCTAD. 2010. Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims. IIA Issues Note, No. 2 (December). Geneva: United Nations.

- UNCTAD. 2012. Investment Policy Framework for Sustainable Development. Geneva: United Nations. UNCTAD. 2012. Fair and Equitable Treatment.

- UNCTAD 2014, 2015, 2016 TRADE and Development reports.

- UNCTAD 2014, 2015 World Investment Reports.

- UNCTAD 2016 Rethinking Development Strategies after the Financial Crisis. Vol. I, Making the Case for Policy Space. Vol. II: Country Studies and International Comparisons, Geneva, New York.

- World Bank Rapport sur le développement dans le monde 2016: les dividendes du numérique, 2016.

- WTO 2015 Annual Report.

• Jean Ziegler, Andere die Welt! Warum wir die kannibalische Weltordnung stürzen müssen (C. Bertelsmann, München, 2015).